In the
Supreme Court of the United States
OCTOBER TERM, 1943

No.

BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, STATE OF OKLAHOMA; JOHN MALTSBERGER, County Treasurer and AMOS TETER, Tax Assessor of Pawnee County, State of Oklahoma,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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February, 1944.

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Petitioners,

vs.

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Respondent.

BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, STATE OF OKLAHOMA, JOHN MALTSBERGER, County Treasurer, and AMOS TETER, Tax Assessor of Pawnee County, State of Oklahoma,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

This case challenges the constitutionality and, alternatively, the misapplication by the Secretary of the Interior, of an Act of Congress authorizing said Secretary of the Interior to acquire agricultural and grazing lands in proportion to the respective needs of the Indian or Indians for whom such lands are purchased, providing that the title thereto shall be taken in the name of the United States in trust for the tribe, band, group or individual Indian for whose benefit such land is so acquired, and providing that while title thereto is held by the United States said lands shall be free from any and all taxes, excepting gross production taxes.

The statute involved is Act of June 26, 1936 (25 U. S. C. A., § 501), which reads as follows:

> "The Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange or assignment, any interest in lands, water rights or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership; Provided, that such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the par-

> ticular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is hereby authorized and directed to cause to be paid."

This case also attacks jurisdiction in the trial court by reason of the fact that federal district courts are prohibited by the Act of April 20, 1940, as amended (28 U. S. C. A., § 41 [1]), from entertaining suits to enjoin the collection or assessment of state taxes "where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state." The text of said act (28 U. S. C. A., § 41 [1]), is set out in Appendix One following the brief.

The act in question had never been the subject of litigation until the case at bar arose, and, while the tax amount involved within the immediate scope of the action is negligible, the principles of law enunciated by the trial and circuit courts plot for the Secretary of the Interior a future course of action which is of utmost gravity to the tax structure of the State of Oklahoma.

The action was instituted in the United States District Court for the Northern District of Oklahoma by the

United States of America against the Board of County Commissioners, County Treasurer and County Assessor of Pawnee County, Oklahoma, for a decree adjudging to be non-taxable certain real estate which Colonel Moore, a Pawnee Indian, and his wife, had conveyed to the United States of America in trust for certain of his minor children.

In substance, the factual picture is as follows: Colonel Moore, a Pawnee Indian, and his wife, Dollie Moore, on October 19, 1939, executed four warranty deeds conveying four tracts of land to the United States of America in trust. One tract was in trust for their minor child, Wilson Freemont Moore; one tract in trust for their minor child, Regina Margaret Moore, and two tracts in trust for their minor child, Phyllis Sadie Moore.

Colonel Moore was a restricted Pawnee Indian, but the lands conveyed to the United States in trust were theretofore taxable. Each of the warranty deeds referred to hereinabove was approved by the Secretary of the Interior on August 7, 1940.

Wilson Freemont Moore was born on November 1, 1931.

Regina Margaret Moore was born on January 7, 1927.

Phyllis Sadie Moore was born on August 31, 1928.

The oldest of these children is now seventeen years old. The youngest is but thirteen years old. They do not live on the lands conveyed to the United States in trust for them, but reside with and are supported by their

parents (See stipulation appearing on pages 19 to 23 of the transcript of the record).

Colonel Moore's land holdings were so extensive that it became difficult for him to discharge the tax obligations thereon (Transcript, p. 33. He went to Washington to see what arrangement he could make to pay the taxes (Transcript, p. 31). The Indian Commissioner required him to sell some of his land to obtain funds to pay his taxes and devised the scheme or plan of conveying this land in trust to the United States for his children to remove it from the tax rolls. The correspondence introduced in evidence as Exhibits 1 to 11, Transcript, pp. 31 to 46, plainly shows the existence of such scheme or plan to effect a removal from the tax rolls of the land involved. *Colonel Moore was advised to make taxable land the subject of the deed when it was discovered that he had intended deeding a piece of non-taxable land.* See Exhibit 3, letter from Assistant Indian Commissioner to Pawnee Agency, dated May 6, 1939 (Transcript, pp. 32 to 34).

The case was tried upon a complaint, answer, stipulation, certain letters between the Indian Office in Washington, the Superintendent of the Indian Agency at Pawnee, Oklahoma, and Colonel Moore, and duplicate tax receipts introduced in evidence by defendants (petitioners here), showing the tax burden of Colonel Moore.

The trial court rendered its decree adjudging that the lands involved were non-taxable under the act, *supra,* for the years 1941, 1942 and succeeding years, ordered said

lands stricken from the tax rolls, and enjoined the appellants from proceeding to levy and collect any ad valorem taxes against said real estate for such years, or succeeding years so long as the status of said real estate remains unchanged. The trial court held said lands to be taxable for the year 1940. From said judgment, the defendants appealed, and the United States of America took a cross-appeal. In the cross-appeal the United States of America contended that since the lands involved were conveyed to the United States on October 19, 1939, the same were non-taxable for the year 1940, although the Secretary of the Interior did not approve the deeds until August 7, 1940. One transcript of record was certified from the trial court, one brief was filed by each side, and the court wrote a single opinion, although the appeal and cross-appeal were docketed as separate cases. The appeal and cross-appeal involved identical parties and identical subject-matter.

The Circuit Court, on November 26, 1943, affirmed the judgment of the trial court on appeal, and held on cross-appeal that said lands also were non-taxable for the year 1940. The opinion of the Circuit Court is set out in full in the transcript at pages 71 to 79. Mandates of the Circuit Court were issued to the United States District Court for the Northern District of Oklahoma on January 5, 1944. The judge of the trial court on January 10, 1944, issued an order staying enforcement of the judg-

ment under the mandates. A certified copy of said order is set forth in Appendix Two following the brief.

II.

STATEMENT OF BASIS OF JURISDICTION

It is believed that the jurisdiction of this Court to review the judgment in question is sustained by:

Section 240 of the Judicial Code, as amended (28 U. S. C. A., § 347 [a]);

Rule 38, Sec. 5, Subsec. (b), Rules of the Supreme Court of the United States, as amended.

III.

QUESTIONS PRESENTED

Correctness of the Circuit Court's decision holding in effect that:

(1) The trial court had jurisdiction of a suit to enjoin the collection and assessment of taxes imposed pursuant to state law where a plain, speedy and efficient remedy was available in the state courts;

(2) The act in question does not constitute an invalid delegation of legislative power to the Secretary of the Interior;

(3) The Secretary of the Interior could utilize the act to instigate and promote a scheme and plan to remove otherwise taxable land from the tax rolls;

(4) The Secretary of the Interior could acquire land of questionable agricultural and grazing character for minor Indian children living in an urban community not "in proportion to the respective

needs of the particular Indian or Indians for whom such purchases are made;"

(5) The land was non-taxable for the year 1940, although the deeds of conveyance were not approved until August 7, 1940.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

This case presents questions of extreme importance to the State of Oklahoma. The congressional act under discussion is a recent enactment (June 26, 1936). The action instituted in the federal district court brought for the first time its application and effect into litigation. The decision of the Circuit Court stands until overthrown by this Court as a precedent supporting future action by the Secretary of the Interior in a program destined to remove a vast amount of land in Oklahoma from the tax rolls under the pretended guise of acquiring "agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made."

Conceding, for the purpose of argument, the constitutionality of the act it is our contention that the Secretary of the Interior may not utilize its provisions to instigate and promote a scheme or plan to relieve an Indian landowner of tax obligations. The ambit of the act, if at all valid, may authorize said secretary to acquire lands for the benefit of Indians under the conditions laid down

therein, but its spirit and purpose may not be perverted to aid and abet a deliberate policy designed to remove land otherwise taxable from the tax rolls. The Indians for whom the land was acquired in the case at issue were minor children living at home with their parents (Transcript, p. 20). The land was rented for an inconsiderable sum (Transcript, p. 20), which of itself, negatives the idea that the land was agricultural and grazing land. The proceeds of rental therefrom inured to the parents to defray the expense of supporting the minor children (Transcript, p. 20). Surely Congress did not have in mind such a utilization of the act when it enacted the same.

While our principal attack upon the act is directed to the manner in which it was applied in the instant case, we are also concerned with its doubtful constitutionality on the ground that it is an invalid delegation of legislative power.

It will be noted that under the act there are only two limitations upon the power of the secretary in acquiring land for Indians. These are: (1) That the land shall be "agricultural and grazing land of good quality and character," and (2) the lands shall be "in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made."

Outside this, there is no limitation whatever on his power. The matter of which Indians are to receive land is left entirely up to him and note that there is no policy laid down requiring him to treat individuals in the same

need alike. The act does not say or intimate that he shall buy for all landless or needy Indians. He *may* buy for any Indian. He is *compelled* to buy for none. If he does buy he must buy agricultural and grazing lands "proportionately to the needs" of the Indian. This is the sole limitation on his power. He may buy for young or old; full-bloods or one-sixteenth blood; for Cherokee or Otoes, or for whomever he chooses. What is worse, he may buy for one Indian and leave another in exactly the same circumstances unprovided for. He may favor his friends and punish his enemies. All this is left entirely up to his unlimited uncontrolled discretion.

There is no intimation in the act of what Congress had in mind. The secretary cannot know what Congress wanted him to do. No policy is laid down, no standard or guide set out. He cannot know whether Congress wanted him to acquire lands for young or old, for those of half blood, or those of fourth blood, those already having some land or those having none. If the secretary exercises the powers given him he must do so blindly, not in furtherance of any legislative scheme, but entirely in accordance with his own desires.

Since this act gives to the secretary the power to decide which Indians shall have land and which shall not, and where, and in what amounts, he, not Congress, has the power to make the law. It is of this that we complain.

Where did Congress lay down any policy or establish any standard whereby the discretion of the secretary in buying these lands was to be controlled? Where is he given to know what Congress wanted him to do? What Indians did Congress intend to benefit by this act?

The government may contend that the secretary is limited in that he may buy only agricultural and grazing lands in proportion to the needs of the particular Indian he buys for. *But* the fallacy is that he does not *have* to buy for any *particular* Indian or *class* of Indians.

Congress did not say that lands should be acquired for all needy Indians. Congress said the secretary may buy for any Indian. Whether he does or not is entirely up to him. He may pick and choose. He may buy for one and not for another. Giving the act the benefit of every doubt the policy of Congress amounts to no more than this:

> *Some* Indians may be given grazing and agricultural lands suitable to their needs.
>
> *Who such Indians may be* shall be left entirely to the Secretary of the Interior.

It is submitted, therefore, that in effect, the secretary has the power to make the law. He decides entirely whether or not old or young, good or bad, full bloods or half breeds get the land. Remember he does not have to acquire land for all who need it. He may acquire for one and not for another. He may favor one and punish another. Congress has delegated to him the uncontrolled

power to make the law and has given him no intimation what it wants that law to be. Such delegation of power is unconstitutional and void.

Further, the attention of the Court is called to the fact that this attempted delegation of power is contrary to the policy laid down by Congress heretofore in acts allotting lands to Indians. Under all of the other acts Indians of a certain tribe or percentage of blood were given definite amounts of land. Always before all Indians of a like class were treated equally. Congress said exactly how much each one should have. Here there is no equity or justice. Of two Indians situated in exactly similar circumstances, one may be given land, the other nothing. It is doubtful if Congress, itself, under its plenary power to deal with Indians, could deal disproportionately with two similarly situated Indians from mere whim or caprice. Certainly it cannot delegate the power to do so.

We further complain that the trial and circuit courts erred in holding that the action was within the permitted jurisdiction of the federal courts. 28 U. S. C. A., § 41 (1) (quoted in Appendix One following the brief), denies jurisdiction in United States District Courts of suits to enjoin the collection or assessment of taxes imposed by the laws of a state where an adequate remedy may be had in the courts of such state. The Circuit Court ruled in its opinion (Transcript, pp. 71 to 79) that it is doubtful whether this provision is applicable to the government,

even though the United States is specifically named in the first portion of the section, but said:

> "We deem it unnecessary, however, to resolve this particular question, since we are convinced that a plain, speedy and efficient remedy at law or in equity in the courts of the state is not available to the United States."

The Circuit Court thus reserved the question as to whether the United States comes within the scope of the act.

It is the contention of petitioners that a plain, speedy and efficient remedy in equity in the courts of Oklahoma is available to the United States in the instant case and the existence of this remedy is settled by state statutes and decisions.

Petitioners urge this Court to resolve this proposition so that there may be established a definite rule to guide the conduct of similar litigation in the state and the federal courts of Oklahoma. The point is left in a disputed state unless, as we here respectfully pray, this Court decides the question.

We contend the Circuit Court also committed error in ruling that the land involved was non-taxable for the year 1940, even though the deeds of conveyance were not approved by the Secretary of the Interior until August 7, 1940. This decision apparently was reached on the theory that the deeds were executed on October 19, 1939, and the approval related back to such date. We assert that such decision is in conflict with general rules of law

which we believe will show that since such deeds were conditional in nature the land was taxable on January 1, 1940, and consequently taxable for the ensuing fiscal year.

Our contentions may be summarized in the following manner:

(1) The Circuit Court erred in ruling that—

(a) the trial court had jurisdiction of the action despite the plain provisions of 28 U. S. C. A., § 41 (1), which denies jurisdiction of federal district courts in suits to enjoin the assessment or collection of state taxes where a plain, speedy and efficient remedy may be had in the courts of such state;

(b) the act did not constitute an unconstitutional delegation of power to the Secretary of the Interior;

(c) the Secretary of the Interior did not abuse the discretion vested in him by the act;

(d) the land was non-taxable for the year 1940.

Your petitioners respectfully contend that a decision of this Court should be had precisely defining the limitation upon the discretion to be exercised by the Secretary of the Interior in order to avoid great confusion and misapplication of the act in the future. Permitted to stand, the Circuit Court decision becomes a precedent for the future guidance of the Secretary of the Interior in cases similar to that at bar in which he may, for the purpose of relieving Indian owners of tax burdens, invoke the provisions of the act in a manner wholly unrelated to the legislative policy and design. The State of Oklahoma, if

the Interior Department is left free to pursue an unhampered and untrammelled course under the act, faces a serious loss of revenue through wholly erroneous application of a congressional act by an administrative officer.

The exercise of discretion by the Secretary of the Interior plays no casual part in the scheme of taxation in this state. Oklahoma still has a large Indian population who are potential beneficiaries under the act and a large amount of property may unjustly and erroneously be removed from the tax rolls unless the act either is declared invalid by this Court or limited to the sphere Congress plainly intended it should occupy.

Petitioners respectfully contend that this case is of such a character that the last word, the ultimate guiding rule should be announced by the Supreme Court as under Rule 38, § 5, Subsec. (b) of this Court:

> "a circuit court of appeals * * * has decided an important question of federal law which has not been, but should be, settled by this court."

Wherefore, your petitioners pray that a writ of certiorari be issued from and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings therein; and that the judgment and decree of the said United States Circuit Court of

Appeals for the Tenth Circuit be reversed by this Honorable Court, and that your petitioners have such other and further relief as to this Court may seem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION

OPINION BELOW

Although this case involved an appeal and cross-appeal from the judgment of the trial court, one opinion, written by Judge Alfred P. Murrah, was delivered on November 26, 1943, by the Circuit Court of Appeals. It appears on pages 71 to 79 of the transcript. The opinion is reported in 139 Fed. (2d) 248.

FACTS

Since the facts are detailed hereinabove as a part of the petition, we shall not burden this brief with a further recitation thereof other than to emphasize certain portions as a necessary adjunct to this brief.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1 (43 Stat. 938 [28 U. S. C. A., § 347 (a)]), providing in part that:

> "In any case, civil or criminal, in a circuit court of appeals * * *, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judg-

ment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Jurisdiction of this Court further is supported by Rule 38, Sec. 5, Subsec. (b), Rules of the Supreme Court of the United States, as amended, which provides that a writ of certiorari may be granted "where a circuit court of appeals has * * * decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way probably in conflict with applicable decisions of this Court * * *."

ARGUMENT

I.

In holding that a federal court had jurisdiction of the case, the Circuit Court erroneously decided a question never before determined by this Court, but which should be resolved thereby.

Despite the provisions of the Act of April 20, 1940, as amended (28 U. S. C. A., § 41 [1]), the text of which is set out in Appendix One following the brief, the Circuit Court ruled that the lower court had jurisdiction of the suit. This act denies jurisdiction in federal courts of suits to enjoin the collection of taxes imposed pursuant to state law where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state.

While the Circuit Court opinion casually adverted to the belief that the United States of America is not affected by the restrictive provisions of the above act, it based its principal holding upon the theory that such a remedy does not exist in the state courts of Oklahoma. We urged in the Circuit Court that the question of whether the United States of America is placed by the above act on a like plane with other litigants be resolved, but following an implication that it is not so situated the Circuit Court said:

> "We deem it unnecessary, however, to resolve this particular question, since we are convinced that a plain, speedy and efficient remedy at law or in equity in the courts of the state is not available to the United States."

Petitioners feel entitled to a determination of whether the State of Oklahoma in like cases where a plain, speedy and efficient remedy is available in its courts is entitled to have such suits brought in state courts rather than in federal courts. The jurisdiction act above specifically named the United States of America and in a proviso denies the entertainment in a federal court of tax injunction suits involving state taxes. A strict construction of the act brings the United States of America within its terms. It has recently been said that the policy of this section and due regard for the rightful independence of state governments both call for a strict construction of jurisdictional requirements. *Central Mexico Light & Power Co.* v. *Munch* (Second Circuit), 116 Fed. (2d) 85.

And this Court has ruled that federal courts should scrupulously confine their own jurisdiction to the precise limits which have been defined by this section, in due regard for rightful independence of state governments. *City of Indianapolis* v. *Chase National Bank*, 62 S. Ct. 15, 314 U. S. 63, 86 L. ed. 47.

The problem of whether the United States of America may enter its own courts to settle litigation over tax injunction disputes arising under the laws of the state becomes increasingly complex under the act here giving the Secretary of the Interior the authority to purchase lands for Indians. The title to such lands will be held in the name of the United States of America. Much litigation will result. Whatever be the ultimate outcome, it is our assertion that the independence of state judicial processes should be preserved inviolate in their own sphere. Such is the intent and purpose of the act limiting the jurisdiction of federal courts of these suits.

The argument hereinabove assumes the existence of a plain, speedy and efficient remedy at law or in equity in the courts of the state. The Circuit Court held otherwise and said that "we are convinced that a plain, speedy and efficient remedy at law or in equity in the courts of the state is not available to the United States." The Circuit Court, in its opinion, considered only the nonexistence of a remedy at law and wholly ignored a remedy in equity which does exist in the state courts. The opinion erroneously limited its holding to suits at law where a

tender of payment under protest is necessary as a condition precedent to maintenance of the action. It took no account of statute and court decisions in Oklahoma establishing the right to restrain the collection or assessment of illegal taxes. Title 12, Okla. Stat. 1941, § 1397.[1] *This remedy is available only where the aggrieved party has no taxable property within the tax district of which complaint is made.* Title 68, Okla. Stat. 1941, § 15.49, quoted in part.[2] The United States of America certainly has no taxable property in Pawnee County since under Art. 10, § 6 of the Oklahoma Constitution, all property of the United States of America is exempt from taxation.

Title 68, Okla. Stat. 1941, § 360, provides that tender of payment must be made to support a suit to enjoin the collection or assessment of a tax, but our courts have said that where a tax is alleged to be illegal and void this rule does not apply. *Meriwether* v. *Bowling* 184 Okla. 1, 84 Pac. (2d) 1; *Eakin et al.* v. *Chapman*, 44 Okla. 51, 143 Pac. 21; *Jones* v. *Holzapfel et al.*, 11 Okla. 405, 68 Pac. 511.

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1. 12 O. S. 1941, Sec. 1397:

"An injunction may be granted to enjoin the enforcement of a void judgment, the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same . . ."

2. 68 O. S. 1941, Sec. 15.49:

". . . Equitable remedies shall be resorted to only where the aggrieved party has no taxable property within the tax district of which complaint is made."

We repeat that the federal court did not have jurisdiction of this suit for the foregoing reasons, and the Circuit Court has thus (1) erroneously decided that a remedy does not exist in the state courts and (2) refused to determine whether the United States of America may sue in its own courts in this class of cases despite the provisions of the act quoted in Appendix One hereto which denies jurisdiction therein.

II.

The Circuit Court held the act under discussion to be a valid delegation of legislative power contrary to general principles of law announced by this Court.

By the act the Secretary of the Interior is given power to acquire agricultural and grazing lands of good quality and character for any Indian suitable to the need of the Indian for whom acquired. The character of the land and its suitability to the need of the beneficiary thus are the sole limitations upon the power of the secretary. The act opens for him an avenue of unrestrained official conduct in purchasing unlimited quantities of land for whomever among the Indian tribes he may deign to choose. It lays down no standard or rule of action for him to follow, and in effect, leaves to his official conscience and discretion the right to determine what the law shall be, upon whom its benefits may be showered and to whom its gifts may be denied. We believe that the following outline fairly states the law governing the delegation of legislative power:

1. Congress may not delegate its powers to make laws

2. Congress may delegate the power to make rules or exercise discretion in the execution of a law—

   but:

   such law must contain a framework, rule, guide or policy, within which the rules or discretion are to be exercised.

3. The right to exercise unrestrained and arbitrary discretion may not be the subject of delegation, and any law purporting to grant such right is void.

The law relating to delegation of legislative power has on numerous occasions been the subject of extensive review by this Court. In *Panama Refining Co.* v. *Ryan*, 55 S. Ct. 241, 293 U. S. 388, 79 L. ed. 446, at page 464, it is said:

> "Thus, in every case in which the question has been raised, the court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.
>
> "If § 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the president or other officer or to any administrative body. The question is not of the intrinsic im-

portance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

To escape the forbidden unconstitutional exercise of legislative or judicial authority, the discretion granted by a statute must be lawfully exercised in accordance with established principles of justice. As said in 11 American Jurisprudence, at page 947:

> "It cannot be a mere arbitrary choice, for it has been said that in the American system of government no room is left for the play and action of purely arbitrary power. A distinction is consequently drawn between a delegation of the power to make the law which necessarily includes a discretion as to what it shall be and the conferring of authority or discretion as to its execution. The first cannot be done, but the second, under certain circumstances, is permissible."

Yick Wo v. *Hopkins*,
6 S. Ct. 1064, 118 U. S. 356, 30 L. ed. 220;
Union Bridge Co. v. *United States*,
27 S. Ct. 367, 204 U. S. 364, 51 L. ed. 523.

The act under discussion may be said to be one of a series in a long line of Indian legislation immunizing lands held by such persons from the taxing power of the states. But a sharp line of demarcation may be drawn between this act and prior legislation in that it has been the broad policy of Congress to deal equally with Indians of a like class. Quantum of blood and membership in a particular band or tribe have long been considerations influencing Congress in the passage of tax exemption laws affecting Indian lands. It is a matter fraught with

extreme doubt that Congress itself, under its admitted plenary power to deal with Indians, may treat disproportionately two similarly situated Indians from mere whim or caprice. *We contend that certainly it cannot delegate the power to do so.*

The Circuit Court thus has decided an important question of federal law which has not, but should be, resolved by this Court.

III.

The Secretary of the Interior has misapplied the act in such a manner that his acts are not within the scope of the legislation.

If the act be valid and if the manner in which the Secretary of the Interior gave exercise to his discretion thereunder be appropriate, as held by the Circuit Court, Oklahoma stands powerless to resist future misapplications of the act. Its tax revenues, already decreased by a myriad of federal tax exemption legislation covering Indian lands and a vast quantity of other lands acquired by the federal government in Oklahoma, threaten to be further diminished if the secretary is left free to pursue schemes and plans to remove otherwise taxable property from the tax rolls.

The evidence in this case, as detailed in the petition hereto, points to the existence of such a scheme and plan in the instant situation. Colonel Moore first intended to deed a piece of non-taxable land to his children. He was

advised by the Assistant Indian Commissioner through the Pawnee Indian Agency to make taxable land the subject of the conveyance. The principal purpose of the transfers to his minor children was not to safeguard their welfare under the act, *but to effect a removal from the tax rolls of some of his land and relieve him of the tax burden.* We are sympathetic toward a landowner unable to discharge tax obligations upon his property through adversity and economic assaults, but, peculiarly enough, the burden of taxes has been found an insuperable obstacle to retention of land by many Oklahoma citizens without Indian blood. We cannot even remotely entertain the belief that Congress, in passing the act herein, intended to lend itself to such a blatant scheme of depriving the State of Oklahoma from rightful tax revenue under the pretended guise of a lawful and appropriate exercise of the benefits granted by the statute.

Heretofore, Congress has wisely imposed limitations upon land quantity in allotments and grants to Indians. The act here does not fix any such limitation other than to state in general terms that the lands must be in proportion to the respective needs of the particular Indian or Indians. No condition of poverty or need is directed to be fulfilled by the beneficiary. For example, a rich Indian owning 10,000 cattle might have a vast acreage acquired for him and contend that it is in "proportion to his needs." Such an interpretation is absurd, but the Circuit Court opinion does not prevent this result. If

the act means anything, it approves the acquisition of lands for landless Indians who may be placed upon it and become self-sustaining. The committee reports and debates in Congress disclose that such was the congressional intent. Excerpts from said reports and debates are set out in Appendix Three following this brief. It is undisputed that the minor children of Colonel Moore, for whom the lands were acquired herein, live at home and the property is rented to tenants (Transcript, p. 20). The government contends that lands to be rented out are proportional to these children's needs, as they may need the income from the rented property. If Congress did not intend that the Indians should be required to live upon and till the land, why was the power to purchase restricted to agricultural and grazing land? If rental property could be "in proportion to the needs" of the Indians, why could not town property be purchased, especially when it is commonly known that a better return can be had from town rentals than from farm rentals. It is evident that Congress did not intend to include rental property under the term "respective needs of the particular Indian."

The trial court erroneously held, in which holding it was supported by the Circuit Court, that the land involved herein was "agricultural and grazing lands of good character and quality." The evidence contained in the stipulation (Transcript, pp. 11, 12, 13, 14, 20 and 21) reveals that the land so purchased was negligible in value

and was rented for amounts so small as to dispute the fact that it was of such character. The Circuit Court was not bound to accept the facts found by the trial court under the general rule of law. In *Photoplay Pub. Co.* v. *La Verne Pub. Co., Inc.* (Third Circuit), 269 Fed. 730, it is said:

> "The rule that appellate courts will generally accept the facts found by the trial court, which is based on the better opportunity of the trial judge to pass upon the credibility of witnesses, whom he sees and hears, does not apply in a suit where the testimony was taken by deposition and was uncontradicted."

See, also, *United States of America* v. *Corporation of the President of the Church of Jesus Christ of Latter-Day Saints et al.* (Tenth Circuit), 101 Fed. (2d) 156.

IV.

In holding that the land involved was taxable for the year 1940, the Circuit Court has ignored decisions of this Court and its own.

The lower court held that the lands here were taxable for the year 1940. The United States of America took a cross-appeal and the Circuit Court ruled that the lands were non-taxable for such year on the theory that as the deeds of conveyance were executed on October 19, 1939, and were approved by the Secretary of the Interior on August 7, 1940, the date of such approval related back to the execution date.

We contend that the United States did not accept the lands conveyed until the Secretary of the Interior

accepted same by giving his approval thereto. Consequently, the conveyances were not effective to convey title to the United States until August 7, 1940, when the Secretary of the Interior accepted and approved the conveyances.

In *United States* v. *Alabama*, 61 S. Ct. 1011, 313 U. S. 274, 85 L. ed. 1327, in paragraph three of the syllabus:

> "An inchoate lien imposed by a state statute as of the tax day for taxes to be assessed during the year is valid as against the United States, where it acquires the property after the tax day, though before the perfecting of the lien by final assessment of the tax."

In the body of the opinion, the Court said:

> "* * * We perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date. It is familiar practice for grantees who take title in such circumstances to see that provision is made for the payment of taxes and the government could easily have protected itself in like manner."

It is established by Oklahoma law that the assessment date, January 1st, fixes the tax status of the land for the ensuing fiscal year, and a subsequent voluntary transfer of the land to a tax-exempt body does not operate to extinguish the tax liability. *Board of Com'rs of Comanche County, Oklahoma*, v. *Central Baptist Church*, 136 Okla. 99, 276 Pac. 726.

The rule laid down in *United States* v. *Alabama, supra*, was applied to Oklahoma taxes on August 22, 1942, in

Board of Com'rs of Creek County, Oklahoma, v. *Seber et al.*, — S. Ct. —, 318 U. S. 705, 87 L. ed. 807, affirming 130 Fed. (2d) 663. Also see *Muskogee County* v. *United States* (Tenth Circuit), 133 Fed. (2d) 61.

The Circuit Court thus ignores the holdings of these cases and it is contended that it has thereby erroneously ruled the lands in the instant case to be taxable for the year 1940.

CONCLUSION

It is respectfully submitted that this case is of such a nature that the supervisory power of this Court in the matter of issuance of writs of certiorari should be exercised. A definitive decision on the points raised here would thus be a vehicle clearing the confusion resulting from the Circuit Court opinion which plots an uncontrolled course of action for the Secretary of the Interior, and in settling the jurisdictional question which, as affects the United States of America, is still of first impression.

Respectfully submitted,

Randell S. Cobb,
Attorney General of Oklahoma;

James W. Bounds,
Assistant Attorney General;

L. M. Kimbey,
County Attorney,
Pawnee County, Oklahoma,

Counsel for Petitioners.

February, 1944.

APPENDIX ONE

Act of April 20, 1940, as amended (28 U. S. C. A., 41 [1]):

"The district courts shall have original jurisdiction as follows:

"(1) United States as plaintiff; civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory, or (c) is between citizens of a state and foreign states, citizens or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a state, or any rate-making

body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state."

APPENDIX TWO

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 693 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, OKLAHOMA, ET AL.,

Defendants.

ORDER FOR STAY OF ENFORCEMENT OF JUDGMENT

This cause came on to be heard on the motion of defendants in this court and appellants in the United States Circuit Court of Appeals for the Tenth Circuit, for a stay of enforcement of judgment under the mandates herein.

On consideration whereof it is now here ordered that the enforcement of the judgment under the mandates shall be stayed until February 26, 1944, and that if on or before said date there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall

continue until the final disposition of the case by the United States Supreme Court.

/s/ ROYCE H. SAVAGE,
Judge of the United States
District Court for the Northern
District of Oklahoma.

Endorsed:
Filed, Jan. 10, 1944.
H. P. Warfield, Clerk,
U. S. District Court.

United States of America,
Northern District of Oklahoma, ss:

I, H. P. Warfield, Clerk of the United States District Court in and for the Northern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and full copy of the original order for stay of enforcement of judgment in Civil Case No. 693—United States of America, Plaintiff, v. Board of County Commissioners of Pawnee County, Oklahoma, *et al.*, Defendants, now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Tulsa this 2nd day of February, A. D. 1944.

H. P. Warfield, Clerk.
By Angie Comstock,
Deputy Clerk.

(Seal)

APPENDIX THREE

The first bill considered was Senate Bill No. 2047. It was much longer than the final act and was reported out of the Committee on Indian Affairs by Senator Thomas in Senate Report 1232. It was passed by the Senate August 16, 1935. Section 6 of that Act was the one providing for the purchase of lands and reads as follows:

> "Sec. 6. For the purpose of providing lands for Indians in the State of Oklahoma, the Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange or assignment, any interest in land, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted lands now in Indian ownership, allotted or inherited, whenever said secretary deems it advisable to permit the present Indian owner or owners to part with the same or their interests therein. In the sale of any restricted Indian land, pursuant to the terms of this or any other act of Congress, the Secretary of the Interior shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians of the same or any other tribe, at a fair valuation to be fixed by appraisement satisfactory to the Indian owner or owners of such restricted land, or if offered for sale at auction said secretary shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians by meeting the highest bid otherwise offered therefor. Title to all land so acquired or set aside shall be taken in the name of the United States, in trust for the tribe, band, group or individual for whose benefit such land is so acquired, and the Secretary of the Interior is hereby authorized to designate or proclaim the tribe, band, community

or group of Indians for whose benefit such land is so acquired, and said secretary is further authorized to prescribe such rules and regulations as he may deem necessary to control the use, management and operation of such lands for the benefit of the Indians, including the assignment of the right to use part or parts of such land by individual Indians, the ownership of any improvements placed thereon by or at the expense of the occupant to remain in such occupant and to be devisable and inheritable under such rules and regulations as the Secretary of the Interior may prescribe, and not otherwise: Provided, that in accepting title to any individually owned restricted Indian land for the benefit of any tribe or group of Indians, the Secretary of the Interior, in consideration for such conveyance, may assign the same land to or for the benefit of the former Indian owner or owners, *for such period or periods as the said secretary may deem proper, including a further right or power in such former owner or owners to lease such land to third parties, upon such terms and conditions as the Secretary of the Interior may prescribe*: Provided, however, that nothing herein contained shall be construed as granting or recognizing in any such individual occupant or his or her heirs, any title to any tribal or communally owned lands so occupied, or as giving to the courts of the State of Oklahoma any jurisdiction over any matter affecting the title to, right to use or occupy, or the ownership of any improvements located on any such tribal or communally owned lands; all of which questions are hereby committed to the exclusive jurisdiction of the Secretary of the Interior. Any restricted land, funds, or other securities belonging to Indians of the State of Oklahoma shall, while held by the Secretary of the Interior, be free from any and all taxes save those provided by existing law."

The act went to the House and was amended in Committee, came out in its present form, and thereafter passed

by the Senate. Section 6 of the original Senate Bill became Section 1 of the present act (Section 501, Title 25, U. S. C. A.).

It will be noted that the original Senate Bill contained a clause giving the secretary the right to acquire land from an Indian in trust for that particular Indian. Also that the former owner could lease to third parties.

Both these provisions were left out of the act as finally passed. *Surely this evidences an intent on the part of Congress not to permit rental lands to be acquired.* It also shows that Congress did not intend for an Indian to deed land to the government for his own benefit.

Petitioners now quote from the debates and Committee reports to show the intended purpose of this act.

Mr. Thomas, in explaining the purpose of the original act as reported in Volume 79 of the Congressional Record (74th Congress, 1st Session), said:

> "Mr. Thomas of Oklahoma: Mr. President, the last Congress passed a general welfare Indian bill known as the 'Wheeler-Howard Act.' It was intended to cover all the Indian tribes and Indians in the entire United States. The Indians of Oklahoma are somewhat different from the general mass of Indians in that the Oklahoma Indians have had their reservations cut up and allotted in severalty and the surplus land sold to white settlers.
>
> "The Indians of my state live among the white settlers. All laws applicable to reservation Indians are not applicable to Indians living on farms, as the Indians live in Oklahoma. Because of this distinction the Committee on Indian Affairs at the last session undertook to segregate the Oklahoma Indians from

the other Indians of the United States. This bill is intended to make the provisions of the Wheeler-Howard Act applicable to Indian conditions in Oklahoma. It extends certain provisions to our Indians and makes certain other provisions of law applicable to them. It has to do with their school facilities, hospitalization, *the purchase of land for those who have no land. In general, it is intended to encourage and assist the Indians of the State of Oklahoma.*

"Mr. King: Mr. President, will the Senator yield?

"Mr. Thomas of Oklahoma: Certainly.

"Mr. King: Are those who would be beneficiaries under the bill Indians whose lands have been sold by them and the proceeds probably improvidently employed so they are now without means of support?

"Mr. Thomas of Oklahoma: I think that is correct in the main. In the early days when lands were allotted some Indians were not favorable to the allotment and were not inclined to work the lands. The allotting agents placed them upon lands which were worthless, upon rocks and hills upon which nothing could be grown. *It is the purpose now to take those Indians from those lands and to purchase lands in some other place for them so they may have a chance at least of being self-supporting* * * *.

"Mr. Thomas of Oklahoma: *Under the Wheeler-Howard Act an authorization was made for ten million dollars, two million dollars per year to be appropriated by the Congress for the purpose of buying land for landless Indians. The Indians of Oklahoma will get their proportional share, I take it; at least, I hope so.*"

And the Committee Report (No. 1232), on the original bill, reads as follows:

"*The bill provides further that funds be appropriated for the purpose of purchasing lands for such Indians as may have, through no fault of their own,*

lost their lands. In some sections of the state remnants of tribal lands still remain in the possession and ownership of the government and *in order to provide landless Indians homes*, some of these tracts will be improved with houses.

"The whole plan of the bill is intended to extend to the Indian citizen the fullest possible opportunity to work out their own economic salvation.

"*The lands which the Indians now hold will be protected and additional lands will be provided for those without homes and without a place to reside.* Indian children will be extended school facilities. The health of the Indian citizens will be protected by adequate hospital facilities. Indian citizens who desire to get out from under the management of the Federal Bureau will be enabled to make application and, upon proper showing, they may secure title to their lands and thereafter they may assume their place as full and free citizens of the State of Oklahoma."

And the Committee Report of the Senate Committee on Indian Affairs, dated April 26, 1935, says, in part:

"*Section 8 establishes a policy of land acquisition for landless Indians who desire to live on the land and to use it.* Under this section, the title to such lands, acquired by the Secretary of the Interior for the Indians, is vested in the United States. In any sale of restricted Indian land, the Secretary of the Interior is given a preference right for the purchase of this land for the use of other Indians. Indians may relinquish, exchange, or assign their land titles to the government, retaining the exclusive use of the land, the ownership of improvements thereon, and the right to transmit to heirs. Land acquired by the government under this section will be tax-exempt."

After the bill was sent to the Committee in the House the Committee reported it out in its present form. Mr.

Stubbs, in making the report to the House, in Report No. 2408, said:

> "The bill affects the welfare of approximately 125,000 Indians representing 30 different tribes. This is more than one-third of the total Indian population of the United States. There is a popular impression that the Oklahoma Indians are wealthy. Such is not the case. Generally speaking, the Oklahoma Indians are living in total poverty on land unsuitable for cultivation, and with work opportunities non-existent. Enactment of this legislation will open the door for many of these poverty-stricken people.
>
> "Section 1 of the proposed substitute bill authorized the acquisition of lands, either within or outside the boundaries of existing reservations or nations. The bill directs that only argicultural and grazing lands of good character and quality in proportion to the needs of the Indians be acquired. Title is to be taken in the name of the United States as trustee, *and areas purchased will be assigned to individual use*, but none of the newly acquired lands are to be allotted. All lands purchased are to be non-taxable so long as title remains in the United States, save that provision is made for levying and collecting a state gross production tax on oil and gas produced from newly acquired lands."

(22)

Nos. 721-722

In the Supreme Court of the United States

OCTOBER TERM, 1945

BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, STATE OF OKLAHOMA; JOHN MANNINGER, COUNTY TREASURER, AND ALVIN [illegible], AS ASSESSOR OF PAWNEE COUNTY, STATE OF OKLAHOMA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 721–722

BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, STATE OF OKLAHOMA; JOHN MALTSBERGER, COUNTY TREASURER, AND AMOS TETER, TAX ASSESSOR OF PAWNEE COUNTY, STATE OF OKLAHOMA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 71–79) is reported in 139 F. 2d 248.

JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered November 26, 1943 (R. 79). The petition for a writ of certiorari was filed February 22, 1944. The jurisdiction of this Court is invoked under section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Act of August 21, 1937, 50 Stat. 738, amending section 24 of the Judicial Code, 28 U. S. C. § 41 (1), deprived the district court of jurisdiction to entertain a suit by the United States to enjoin the taxation of its property by county taxing authorities.

2. Whether the Oklahoma Indian Welfare Act of June 26, 1936, involves an unconstitutional delegation of legislative power to the Secretary of the Interior.

3. Whether the lands in question were properly acquired by the United States in accordance with the Oklahoma Indian Welfare Act.

4. Whether the property in question was taxable for the year 1940.

STATUTES INVOLVED

Section 1 of the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967, 25 U. S. C. § 501, and the pertinent provisions of section 24 of the Judicial Code as amended, 28 U. S. C. § 41 (1), appear at pp. 3, 6, 17, *infra;* the pertinent provisions of section 15.49, Title 68, Oklahoma Statutes, 1941, are set out at p. 8, *infra.*

STATEMENT

This is a suit by the United States to restrain the collection of certain *ad valorem* taxes as-

sessed upon its property by petitioners, the taxing authorities of Pawnee County, Oklahoma. The material facts, as disclosed by the record, follow:

Colonel Moore and Dollie Moore, his wife, full-blood Pawnee Indians, by deeds dated October 19, 1939, conveyed to the United States in trust for each of their three minor children, also full-blood Pawnees, certain tracts of agricultural and grazing land in Pawnee County, Oklahoma (Exs. A, B, C, D; R. 11–15, 20, 21). While the children do not live on or till these lands, but reside at home with their parents, the properties are rented and the proceeds used for the support of the children (R. 20). The children do not own any real estate (R. 30). Each deed was approved by the Department of the Interior on August 7, 1940 (R. 19). The conveyances were made pursuant to the terms of section 1 of the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967, 25 U. S. C. § 501, which reads:

> * * * the Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: *Provided,* That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for

> whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross-production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is hereby authorized and directed to cause to be paid.

The lands covered by these deeds were owned by Colonel Moore prior to the date of the conveyances, and from the time he acquired them he had paid all taxes accruing thereon (R. 20–21). Notwithstanding the provisions of the Oklahoma Indian Welfare Act, the county taxing authorities, after the lands were conveyed to the United States, retained them on the tax rolls of the county and assessed *ad valorem* taxes thereon for the years 1940 and 1941, demanded payment of the taxes so assessed and indicated their intention to continue to demand payment of future taxes assessed on these lands (R. 9, 15).

The United States, on October 27, 1941, filed its complaint in the District Court of the United States for the Northern District of Oklahoma, seeking to have the property decreed tax exempt

for 1940 and so long thereafter as title is held by the United States, and to have these lands stricken from the tax rolls of Pawnee County (R. 6–11). Injunctive relief to accomplish this purpose was asked (R. 10–11).

On January 12, 1943, the district court entered judgment granting the relief prayed for, except that it held the property taxable by Pawnee County for the year 1940 (R. 25–27).

Petitioners appealed from said judgment in so far as it adjudged the lands to be nontaxable beginning with the year 1941, and the United States cross-appealed from the judgment in so far as it held the property taxable for the year 1940. The circuit court of appeals held that the district court had jurisdiction of the action, and on the merits found that the Oklahoma Indian Welfare Act was constitutional, and that the land had been lawfully acquired by the United States under that Act. The court further found that the approval of the deeds by the Secretary in 1940 related back to October 19, 1939, the date of their execution, that the tax-exempt status attached to the lands as of that date, and that they were therefore nontaxable beginning with the year 1940 (R. 71–78). The judgment of the district court, as so modified, was affirmed (R. 79).

ARGUMENT

1. Petitioners assert that the district court was without jurisdiction of this suit because of the

1937 amendment to section 24 of the Judicial Code (28 U. S. C. § 41 (1)), which provides:

> Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

We submit, however, that the amendment does not apply to the instant case. The first paragraph of the same section of the Judicial Code (the text of which is set forth in the Appendix, *infra*, pp. 17–18) explicitly provides that the district courts shall have jurisdiction of "all suits of a civil nature, at common law or in equity, brought by the United States." It further grants jurisdiction of suits where the matter in controversy exceeds $3,000, and either arises under the Constitution or laws of the United States or is between citizens of different states. The amendment, if applied to the United States, would plainly lessen and diminish its remedies. And since the United States is not specifically named in the amendment, it is not bound by it because of the rule that the sovereign is not bound unless expressly named. *Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554-555; *Springfield* v. *United States*, 99 F. 2d 860, 862 (C. C. A. 1), certiorari denied, 306 U. S. 650.

Moreover, the legislative history of the amendment shows that it was directed primarily against suits brought by foreign corporations under the diversity of citizenship clause to enjoin collection of state taxes, with the consequent disadvantage to the states of being deprived of tax revenue pending the litigation in the federal courts of the question of tax liability. See S. Rep. No. 1035, 75th Cong., 1st Sess., which was incorporated in H. Rep. No. 1503, 75th Cong., 1st Sess. There is thus nothing in the object sought to be attained or in the mischief sought to be remedied by the legislation from which there can be imputed to Congress an intent to limit the right of the United States to resort to its own courts for protection against imposition of unlawful state taxes on federal property. Cf. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554–555; Gov't Br. in Opp. in *Springfield* v. *United States*, No. 662, October Term, 1938, certiorari denied 306 U. S. 650.

In any event, even if the 1937 amendment applies to the United States, the court below correctly held that no plain, speedy, and efficient remedy is available to the United States under the laws of Oklahoma. Since, as the court pointed out (R. 74, 75), the remedy at law is conditioned upon prior payment of the taxes assessed, such a remedy is clearly inadequate. *United States* v. *Rickert*, 188 U. S. 432, 444; *Springfield* v. *United States*, 99 F. 2d 860, 862

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(C. C. A. 1, 1938), certiorari denied 306 U. S. 650. Indeed, petitioners appear to concede this (Pet. 20, 21), but they insist that the court below failed to consider the availability of possible remedies in equity. In this connection petitioners cite certain provisions of section 1397, Title 12, Okla. Stats. (1941) and section 15.49, Title 68, Okla. Stats. (1941) (Pet. 21). The first of these provisions is of a general character; the authority of the state court to grant an injunction in the cases named is permissive and not mandatory; and clearly, so far as injunctive relief against the illegal levy of a tax is concerned, the authority of the court is qualified by the terms of section 15.49, Title 68, Okla. Stat., which provides, so far as here material, that:

> The proceeding before the Boards of Equalization and appeals therefrom, shall be the sole method by which assessments or equalization shall be corrected or taxes abated. Equitable remedies shall be resorted to only where the aggrieved party has no taxable property within the tax district of which complaint is made.

Since it is the contention of petitioners that the property in question, to which the United States has acquired title, is nevertheless taxable, it seems clear that no equitable remedy is available under this section and, contrary to petitioners' assertion, the circuit court of appeals so construed the state law (R. 75). In any event, it

cannot be said that the state law affords a *plain* remedy readily available to the United States.

As noted by the circuit court of appeals (R. 75), this suit involves the construction and application of a federal enactment. Indeed, all suits in which the United States seeks to free its property from attempted exercise by the states of the taxing power necessarily involve primarily a federal question; and the court correctly pointed out that Congress disclosed no intention to prevent determination of such questions by federal courts.

2. The circuit court of appeals correctly held that section 1 of the Oklahoma Indian Welfare Act does not involve an unconstitutional delegation of legislative power. The Secretary of the Interior has long been the administrative arm of the federal Government in the field of Indian affairs and has been given wide discretion in the enforcement of declared Congressional policy. R. S. 441, 5 U. S. C. 485; Act of May 27, 1908, 35 Stat. 312, section 1; *United States* v. *Rickert*, 188 U. S. 432; *Anicker* v. *Gunsburg*, 246 U. S. 110. The statute here under consideration does not vest the Secretary with unlimited discretion. It authorizes the acquisition of "agricultural and grazing lands of good character and quality", and they must be "in proportion to the respective needs of the particular Indian or Indians." Congress has thus directed the Secretary that lands

may be acquired for needy Indians, has specified the type of lands—agricultural and grazing—and has provided that they must be adapted to the needs of the Indian or Indians for whom they were acquired. The policy of Congress is clear, and adequate standards for its enforcement have been furnished.[1] Congress could not itself undertake to select specific lands or the particular Indians for whom to acquire them, and of necessity had to vest this authority in an administrative officer or body. It legislated "as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute" and laid down the appropriate "primary standards" for administration action. *Buttfield* v. *Stranahan,* 192 U. S. 470, 496. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, chiefly relied upon by petitioners, is not a departure from the rule of earlier cases. The opinion in that case expressly approved the language above quoted from *Buttfield* v. *Stranahan, supra.* The *Panama Refining Co.* decision is significant here only to the extent that it establishes that, where a statute regulates the ordinary business activities of citizens, and seeks to enforce such restrictions by the imposition of legal sanctions, delegated authority will be carefully scrutinized by the courts. Where as here,

[1] Cf. section 5 of the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 985, 25 U. S. C. 465.

a statute deals with subject matter peculiarly appropriate for Government control, the courts have permitted a wide latitude to Congress in delegating authority to administrative officers. See *Buttfield* v. *Stranahan*, 192 U. S. 470 (foreign commerce); *United States* v. *Grimaud*, 220 U. S. 506 (regulation of forest reserves); *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304 (arms export embargo); *Dow* v. *Ickes*, 123 F. (2d) 909 (App. D. C. 1941), certiorari denied, 315 U. S. 807 (establishment of fishing areas). The authority delegated to the Secretary of the Interior by the Oklahoma Indian Welfare Act is therefore a valid exercise of legislative power.[2]

3. The Secretary of the Interior, in the acquisition of the lands here involved, acted properly in accordance with the statute. Petitioners contend

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[2] Petitioners complain (Pet. 22) that the Act contains no limitation upon the amount of land which the Secretary may acquire. The Secretary is, of course, limited by the amount of money which Congress appropriates for this purpose and by the amount of land which others are willing to give. Secondly, by the Act of May 19, 1937, 50 Stat. 188, Congress dealt with the identical question arising under the Act of June 20, 1936, 49 Stat. 1542, by limiting the tax exemption on lands purchased with restricted funds to one hundred and sixty acres. See *Board of Comm'rs* v. *Seber*, 318 U. S. 705, 713. A similar limitation on tax exempt allotted land was incorporated in the Act of May 10, 1928, 45 Stat. 495. The question whether, in the light of these statutes, a similar limitation should be read into the Oklahoma Indian Welfare Act need not be here considered since the acreage acquired for each of the minor Indians is well within that limitation (R. 11–14).

(Pet. 26) that the principal purpose of the transfers was not to serve the interests of the minor Indians for whom the lands were acquired, "but to effect a removal from the tax rolls of some of his [Colonel Moore's] land and relieve him of the tax burden". Both the district court and the circuit court of appeals rejected this contention. Petitioners acknowledge (Pet. 5) that Colonel Moore's economic situation had reached the point where he could not carry the tax burdens imposed upon him. In this situation he expressed a desire to convey certain tracts to the United States in trust for his children under the act in question (Def. Ex. 1, R. 31). The subsequent exhibits in the record (R. 32–46) establish that such relief was afforded to Colonel Moore as could properly be given under Federal law; and if the properties remaining were lost through foreclosure, his minor children would suffer greatly thereby since there would then be no possibility of their inheriting such lands. The acquisition of these properties by the United States assured the minor Indians of the eventual enjoyment of these lands, and was clearly in their interest. The presumption of good faith on the part of the Secretary is thus supported by the record, and both courts below correctly ruled that the Secretary's action was a proper exercise of the discretion vested in him.

Petitioners further contend that the Act does not authorize acquisition of the lands in question because the Act contemplated acquisition of lands

only for landless Indians who could enter upon and work the lands, and that it forbids the acquisition of lands if they are to be rented. These limitations are neither expressed in the Act itself nor evidenced by its legislative history. While relief for landless Indians was clearly a principal objective of the legislation, the remarks of Senator Thomas, sponsor of the bill (Pet. App. viii.), show that Indians who already had land were also within the intended benefits of the Act. Furthermore, the minor Indians in this case were in fact without other lands (R. 30).[3] Not all Indians are immediately capable of entering upon and tilling the land, and the attention of Congress was called to the necessity of temporarily renting, in some circumstances, lands acquired under the Act.[4] Nor does the subsequent revision of section 6 of S. 2047 (which as amended became section 1 of the statute) indicate a different legislative purpose, as petitioners contend (Pet. App. vii) Congress merely refused to enact into law a provision which would enable an Indian to escape taxation simply by deeding his lands to the United States in trust for himself, and which would recog-

[3] The question of the precise scope of the term "Indian" is not presented in this case. Here the beneficiaries, being full-blooded Indians, are clearly within the terms of the statute.

[4] Testimony of Hon. John Collier, Commissioner of Indian Affairs, before the Committee on Indian Affairs, United States Senate, (Hearings on S. 2047, 74th Cong., 1st sess., p. 22).

nize the right of the Indian to lease the lands to third parties.

With regard to these contentions, the opinion of this Court in *Board of Commrs.* v. *Seber,* 318 U. S. 705, 710, in dealing with a similar contention that the Act of June 20, 1936, 49 Stat. 1542, was limited to lands purchased for landless Indians, is pertinent. This Court stated: "We do not read those remarks [of the sponsor of the bill] as limiting the scope of the 1936 Act to landless Indians; they do not deal in terms of exclusiveness. But if they are to be interpreted as petitioners contend, we do not accept them as definitive, because they are opposed to the clear words of the Act, the reasons for its enactment, its contemporary administrative interpretation, and its subsequent Congressional history." The limitations for which petitioners contend would exclude from the benefits of the Act all minors and all adult Indians who, by reason of physical infirmities or other disability, could not immediately occupy and work the lands. Congress obviously did not intend that these Indians, who might be most in need of help, should be excluded from the benefits of its legislation.

Petitioners further contend that the lands acquired here are not "agricultural and grazing lands of good character and quality" within the meaning of the Act. The selection of the lands being entrusted to the Secretary by the Act, his

determination is not subject to judicial review unless it clearly appears that his action is arbitrary. *Dow* v. *Ickes,* 123 F. 2d 909 (App. D. C. 1941), certiorari denied, 315 U. S. 807; *City of Oakland* v. *United States,* 124 F. (2d) 959 (C. C. A. 9, 1942), certiorari denied, 316 U. S. 679. Moreover, even if it were reviewable, it is simply a question of fact which both courts below have determined adversely to petitioners, and which does not warrant further review by this Court.

4. The lands were properly held non-taxable for the year 1940. As noted by the circuit court of appeals (R. 78), the details of the acquisition to be made had been fully determined and approved by the Commisisoner of Indian Affairs prior to the execution of the deeds, and the Commissioner had not only approved the lands to be acquired, but had prescribed the form of deed to be used. Prior to January 1, 1940, the lien date Colonel Moore, acting upon the advice and with the approval of the Commissioner of Indian Affairs, had divested himself of title, subject to the approval of the Secretary, which in the circumstances was purely formal. All matters upon which he might refuse his approval had already been passed upon. Consequently, this formal approval related back to the date of execution of the deeds, October 19, 1939. *Anchor Oil Co.* v. *Gray,* 256 U. S. 519, 522; *Board of County Commissioners* v. *Seber,* 130 F. 2d 663, 670 (C. C. A.

10, 1942). The decision below is not in conflict with the decisions cited by petitioners (Pet. 29-30). The question of relation back could not arise under the facts in those cases, except in *Board of County Commissioners* v. *Seber,* 130 F. 2d 663 (C. C. A. 10, 1942). And in the latter case, to the extent that the facts permitted, the doctrine of relation back was applied.

CONCLUSION

While the questions presented may be important, they were correctly decided by the court below. No conflict of decisions is shown. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1944.

APPENDIX

Section 24 (1) of the Judicial Code, as amended, 28 U. S. C., Sec. 41 (1):

> The district courts shall have original jurisdiction as follows:
>
> (1) United States as plaintiff; civil suits at common law or in equity.
>
> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the

sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

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